No. 277

JOHN T.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

DISTRICT OF COLUMBIA, *Petitioner*,

v.

FENTON M. FADELEY, RICHARD W. FADELEY, F. MERCER FADELEY, FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, AND DOLORES U. FADELEY, *Respondents*.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

Subject Index

	PAGE
Opinions below	1
Grounds on Which Jurisdiction of This Court is Invoked	2
Questions Presented	2
Constitutional Provisions	3
Statutes Involved	4
Court Rules	6
Statement of the Case	8
Reasons for Granting the Writ	13
Conclusion	25

Appendices:

Appendix A:

Judgment of the United States Court of Appeals	8-10
Opinion of the United States Court of Appeals	1-7

Appendix B:

Statements of Points on Review:

Docket No. 1470	10
Docket Nos. 1471 and 1472	11
Docket Nos. 1473, 1474, 1475 and 1476	12

Cases Cited

American Broadcasting Co. v. *Federal Communications Commission*, 85 U. S. App. D. C. 343, 179 F. 2d 437	21
Bensel v. *Commissioner*, 36 B. T. A. 246	21
Bishop v. *United States*, 96 U. S. App. D. C. 117, 223 F. 2d 582	20
District of Columbia v. *McFall*, 88 U. S. App. D. C. 217, 188 F. 2d 991	24
District of Columbia v. *Pace*, 320 U. S. 698	13
General Electric Co. v. *Marvel Rare Metals Co.*, 287 U. S. 430	20
Hovey v. *Elliott*, 167 U. S. 409	15
Interstate Commerce Commission v. *Louisville and Nashville RR Co.*, 227 U. S. 88	15

PAGE

Johnson v. *Manhattan R. Co.*, 289 U. S. 479 20
Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U. S. 123 15
Lamar v. *United States*, 240 U. S. 60 22
Larsen v. *Marzall*, 90 U. S. App. D. C. 260, 195 F. 2d 200 21
Lindner v. *District of Columbia*, 32 A. 2d 540 24
Morgan v. *United States*, 304 U. S. 1 15
National Bank of Washington v. *District of Columbia*, 96 U. S. App. D. C. 395, 226 F. 2d 759 23
North Laramie Land Co. v. *Hoffman*, 268 U. S. 276 24
Ohio Bell Telephone Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292 15
Petterson Lighterage & Towing Corp. v. *New York Central R. Co.*, (CCA 2, 1942), 126 F. 2d 992 21
Rice et al v. *United States*, 85 U. S. App. D. C. 404, 179 F. 2d 26 21
Saginaw Broadcasting Co. v. *Federal Communications Commission*, 68 App. D. C. 282, 96 F. 2d 554, cert. denied 305 U. S. 613 21
Shapiro v. *Rubens* (CCA 7, 1948), 166 F. 2d 659 21
Steinmetz v. *Allen*, 192 U. S. 543 20
Story v. *Snyder, et al*, 87 U. S. App. D. C. 96, 184 F. 2d 454, cert. denied 340 U. S. 866 24
United States v *Forness, et al* (CCA 2, 1942), 125 F. 2d 928 21
Wilson v. *Bowers* (CCA 2, 1932), 57 F. 2d 682 21
Woods v. *Turner* (CCA 10, 1949), 172 F. 2d 313 21

Constitutional Provisions and Statutes Involved

Constitutional Provisions Cited:

The Fifth Amendment to the Constitution of the United States, Vol. 1, p. XLIV, U. S. Code 3, 13, 14, 24

Statutes Cited:

Act of July 10, 1952, 66 Stat. 546, ch. 649:
Section 4(c) 24

District of Columbia Revenue Act of 1937, Sections 3 and 4, Title IX, as added by Section 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 ..... 2, 5
Section 3 ..... 5, 11, 12, 13, 14, 19, 22
Section 4 2
Section 8 ..... 2, 6, 20

District of Columbia Revenue Act of 1939, Sections 1 (a), 1 (h), 2 and 3, Article I, Title V, 53 Stat. 1111, ch. 367 ..... 4, 5
Section 1(a) 4, 11
Section 1(h) 4, 12
Section 2 5
Section 3 5

Page

District of Columbia Code, 1951:

Section 47-1601 4
Section 47-1602 5
Section 47-1603 5
Section 47-2403 5
Section 47-2404 2
Section 47-2408 5
Section 47-2413 (c), Supp. III 24

OTHER REFERENCES

District of Columbia Tax Report Service (CCH. Paras. 13-801-13, 835, inclusive) 6

Rules of the District of Columbia Tax Court:

Rule 9 (a) and (b) 6
Rule 10 7
Rule 11 (a), (b) and (c) 7, 17
Rule 34 ..... 8, 20

United States Code, 1952:

Title 28, Sec. 1254 (1) 2
Vol. 1, p. XLIV 3

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No. ———

DISTRICT OF COLUMBIA, *Petitioner,*

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FENTON M. FADELEY, RICHARD W. FADELEY, F. MERCER FADELEY, FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, AND DOLORES U. FADELEY, *Respondents.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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The District of Columbia, a municipal corporation, through its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled cases on June 7, 1956.

OPINIONS BELOW

The opinions of the District of Columbia Tax Court (R. 119-130; R. 169-194) are not reported. The opinion of the Court of Appeals (Appendix A, *infra*, pp. 1-7) is reported at —— F. 2d ——.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals (Appendix A, *infra*, p. 8-10) was entered on June 7, 1956.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Sec. 4, Title IX, District of Columbia Revenue Act of 1937, as added by Sec. 8 of the Act of May 16, 1938, 52 Stat. 371, ch. 223 (Sec. 47-2404, D. C. Code, 1951).

QUESTIONS PRESENTED

1. Four of the respondents herein, having been assessed District inheritance taxes, appealed to the District of Columbia Tax Court. The only issue raised in such appeals was the correct value of the interests transferred from the decedent to the respondents (R. 147). This issue was decided against respondents by the Tax Court (R. 179). The Tax Court did not, however, make either a finding of fact or a conclusion of law, or enter a decision, on such determination. After trial of the issue respondents moved to amend their petitions to raise a new issue (R. 148) to the effect that if the decedent made a lifetime transfer of her partnership interests to respondents she did so as the result of a "bona fide purchase for full consideration in money or money's worth" (R. 151). The Tax Court granted the motion (R. 148) over the District's objections (R. 196), stating as reason therefor that "substantial justice requires that petitioners [respondents here] be given the opportunity to present the question of full consideration" (R. 150). Six days later, without waiting for the District's answers to the amended petitions, the Tax Court entered its findings of fact, opinion and decisions (R. 196, 199, 202, 205). Although the Tax Court's governing statute, *infra*, specifically requires that the Tax Court "shall hear and determine all questions arising" on appeals to it "and shall make separate findings of fact and conclusions of law" and shall render its decision thereon, *no*

hearing was held on the new issue, nor did the Tax Court make the requisite findings of fact and conclusions of law on such issue. Nevertheless, the Tax Court entered decisions in favor of the respondents holding the assessments erroneous and authorizing tax refunds (R. 194, 206-208), and the Court of Appeals affirmed such action (Appendix A, *infra,* p. 7).

The question presented under these circumstances is:

Was the District of Columbia, petitioner, deprived of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States?

2. Whether the lower Courts had jurisdiction over the remaining three cases under a statute which authorizes appeals to the District of Columbia Tax Court only by a person aggrieved by an assessment of taxes against him, provided such person first pays the tax, where the persons against whom the taxes were assessed did not pay the taxes and where another person, who paid the taxes, had not been assessed such taxes?

CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the Constitution of the United States of America, Vol. 1, U.S. Code, p. XLIV:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTES INVOLVED

Section 1(a) and Section 1(h) of Article I, Title V, of the District of Columbia Revenue Act of 1939, 53 Stat. 1111, ch. 367 (Sec. 47-1601, D. C. Code, 1951):

"Taxes shall be imposed in relation to estates of decedents, the shares of beneficiaries of such estates, and gifts as hereinafter provided:

> "(a) All real property and tangible and intangible personal property, or any interest therein, having its taxable situs in the District of Columbia, transferred from any person who may die seized or possessed thereof, either by will or by law, or by right of survivorship, and all such property, or interest therein, transferred by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth), made or intended to take effect in possession or enjoyment after the death of the decedent, or made in contemplation of death, to or for the use of, in trust or otherwise (including property of which the decedent has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from such property or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom), to the father, mother, husband, wife, children by blood or legally adopted children, or any other lineal descendents or lineal ancestors of the decedent, shall be subject to a tax as follows: * * *"
>
> [Here follow the rates of tax.]
>
> "(h) The transfer of any property, or interest therein, within 2 years prior to death, shall, unless

shown to the contrary, be deemed to have been made in contemplation of death."

Sections 2 and 3 of Article I, Title V, of the District of Columbia Revenue Act of 1939, *supra* (Secs. 47-1602 and 47-1603, D.C. Code, 1951), in material part as follows:

"2. The tax provided in section 1 shall be paid on the market value of the property or interest therein at the time of the death of the decedent as appraised by the assessor, or, in the discretion of the assessor, upon the value as appraised by the probate court of the District. * * *

"3. The appraisal thus made shall be deemed and taken to be the true value of the said property or interest therein upon which the said tax shall be paid, * * *."

Sections 3 and 8 of Title IX of the District of Columbia Revenue Act of 1937, as amended, 52 Stat. 371, 374, ch. 223, as amended (Secs. 47-2403 and 47-2408, D.C. Code, 1951), as follows:

"3. Any person aggrieved by any assessment by the District against him of any personal-property, inheritance, estate, business-privilege, gross-receipts, gross-earnings, insurance-premiums, or motor-vehicle-fuel tax or taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia. The mailing to the taxpayer of a statement of taxes due shall be considered notice of assessment with respect of such taxes. The board

shall hear and determine all questions arising on said appeal and shall make separate findings of fact and conclusions of law, and shall render its decision thereon in writing. The board may affirm, cancel, reduce, or increase such assessment."

* * * * * * *

"8. The board shall adopt and promulgate rules of procedure in matters for determination by the board under the provisions of this title."

COURT RULES

The following rules of procedure promulgated by the District of Columbia Tax Court are applicable:[1]

"Rule 9—Answer.—(a) Every material allegation of fact set forth in the petition shall be deemed to be denied by the District; and no answer shall be required, except when the District shall rely upon new and affirmative matter of defense, or when the District seeks an increase of the assessment, in either of which events an answer shall be filed clearly and concisely stating such new and affirmative matter or the grounds upon which the District relies for such increase of assessment. One original and 2 conformed copies of the answer shall be filed with the Clerk. The Clerk will serve a copy of the answer upon the petitioner or his attorney.

"(b) The answer and any motion to dismiss based on the contention that the petition fails to state facts upon which relief can be granted, shall be filed within 20 days after the date of service of

[1] These rules may be found in the District of Columbia Tax Reports published by Commerce Clearing House, paragraphs 13-801-13, 835, inclusive.

a copy of the petition on the assessing authority and Corporation Counsel, or such motion may be made at the hearing."

"Rule 10—Joinder of Issue.—A proceeding is deemed at issue upon the filing of an answer by the District, or upon the expiration of the time allowed for the filing of an answer, whichever shall first occur."

"Rule 11—Amended and Supplemental Pleadings.—(a) The petitioner may amend his petition at any time within 20 days after the filing thereof, except where an answer has been filed. After answer is filed, or after 20 days after the date of filing the petition, if no answer is filed, a petition may be amended only by consent of the District or on leave of the Board. An answer may be amended only by consent of petitioner or on leave of the Board.

"All motions to amend, made prior to the hearing, must be accompanied by the proposed amendments or amended pleadings.

"(b) When issues not raised by the pleadings are tried by express or implied consent of the parties, they will be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after decision; but failure so to amend does not affect the result of the decision of these issues. If evidence is objected to at the hearing on the ground that it is not within the issues made by the pleadings, the Board may allow the pleadings to be amended.

"(c) When motions to amend are granted at the hearing, the amendment or amended pleading shall

be filed at the hearing or with the Board within such time as the Board may fix."

* * * * * * *

"Rule 34—Findings of Fact and Conclusions of Law. In any proceeding before the Court the findings of fact may be either in numbered paragraphs or in narrative form; and the conclusions of law, either may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court. This rule shall become effective as of November 12, 1952."

STATEMENT

This case resulted from appeals filed by six persons with the District of Columbia Tax Court from assessments of District inheritance taxes. Four of the assessments were made against Fenton M. Fadeley, Patrick A. Deck, Chester A. Blinston and Dolores U. Fadeley, survivors of a business partnership of which said survivors and Ellen H. Fadeley (the decedent) were the owners (R. 168, 169).

The taxes in question were assessed against the four surviving business partners of the decedent to whom was transferred, under self-executing provisions of the partnership agreement and as a result of the decedent's death, that portion of the decedent's interest in the partnership business which exceeded the decedent's capital account in such business. The partnership agreement did not recite any consideration but required each partner to keep a capital account at all times of at least $1,000 for every percent of partnership interest (R. 214). There was no provision in the agreement (R. 213-219) giving any partner an option to purchase, or for the sale of, any partner's interest upon death or withdrawal; but there was provision as follows (R. 217): "It is agreed that no partner will ever

assign or commit any part of his net worth without the voted permission of the rest of the partners." The agreement provided (R. 215) that at the death of any partner the estate of that partner would remain a partner to the end of that calendar year, at which time the partner's capital account would be credited with the partner's full profit for the year, and the capital account would become the property of the executors, with provision for a reserve left on deposit to cover contingent liability for one year. The agreement further provided (R. 215):

> "At the end of the year in which occurs the death of E. H. Fadeley [the decedent], the remaining partners, including any future added partners who, at their selection, must likewise agree to this and additional death provisions mentioned hereafter, hereby agree to reform the three partnerships with profits distributed in the same manner except that to each of the living original partners' percentage will be added the portion of 22-2/3% [the decedent's partnership interest] arrived at by dividing it equally among the other living original partners. (If P. A. Deck, C. A. Blinston, D. U. Fadeley and F. M. Fadeley are all living at that time, to each would be added 5-2/3%)"

There was no provision in the agreement for the decedent to receive a portion of the interest of any other partner who might have predeceased her. The Tax Court recognized this but stated (R. 190): "This, no doubt, was due to somewhat uncanny prescience or belief that she would be the first to die."

The decedent's partnership interests were transferred after the decedent's death as follows (R. 164-166):

Interest Transferred	*Market Value of Interest*
Decedent's capital account (including added profits, interest and capital gain after December 31, 1952), transferred to decedent's estate ..	$108,117.95
Remainder, transferred to respondents F. M. Fadeley, the latter's wife D. U. Fadeley, P. A. Deck and C. A. Blinston, surviving partners	$103,587.68
Total market value of interests transferred, as appraised by the Assessor pursuant to Sec. 2 of Article I, Title V, of the District of Columbia Revenue Act of 1939, *supra*, and as approved by the District of Columbia Tax Court (R. 179)	$211,705.63

The respondents F. M. Fadeley, D. U. Fadeley, Deck and Blinston paid the taxes assessed against them (R. 168) and appealed to the Tax Court where the only issue raised by such appeals was that of the valuation of the partnership interests transferred, specifically so determined by the Tax Court after full consideration of the matter as follows (R. 147):

> "THE COURT: The point of this is this—and I looked through the petitions, and studied them very carefully, and I can find no assignment of error which would cover that. The three assignments of error relate, as I see it, to valuation only, and the facts relate to valuation. There is mention to the agreement in the facts."

The sole issue, which related to valuation of the interests transferred, was decided against the respondents by the Tax Court (R. 179) but the Tax Court did not make a

finding of fact or a conclusion of law on such determination, or enter a decision in respect thereof. Instead, the Tax Court granted a motion (R. 148), over the District's objections (R. 196), permitting the respondents to amend their petitions after trial (R. 148) to allege the following new error in the assessments (R. 151):

> "5.k. If Ellen H. Fadeley [the decedent] made a lifetime transfer of her partnership interests, she did so as the result of a bona fide purchase for full consideration in money or money's worth including the mutual covenants and agreements contained in the partnership agreement."

In granting such motion the Tax Court stated (R. 150):

> "The Court believes that substantial justice requires that the petitioners [respondents here] be given the opportunity to present the question of full consideration, and for that reason the Court will grant the motion for leave to amend and direct that the amendments attached as exhibits to the motion will be received and filed by the Clerk as a pleading in these cases."

The amendments brought into focus that provision of Section 1(a) of the taxing statute, *supra,* which imposes District inheritance taxes on all transfers of property from decedents made "by deed, grant, bargain, gift, or sale (except in cases of a bona fide purchase for full consideration in money or money's worth)." The questions thus presented were wholly unrelated to the issue. Such questions necessitated the taking of evidence and the making of separate findings of fact and conclusions of law thereon, under the Tax Court's governing statute [2] on the following:

[2] Sec. 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended, *supra.*

(1) Whether the decedent made a lifetime transfer of her partnership interests.

(2) Whether, if such a lifetime transfer was made, the transfer was "a bona fide purchase."

(3) Whether, if a bona fide purchase, the transfer was "for full consideration in money or money's worth."

(4) Whether the respondents had exhausted their administrative remedies by presenting these questions to the Assessor for decision prior to appeal to the Tax Court.

Although the Tax Court's governing statute, *supra*, plainly requires that the Tax Court "shall hear and determine all questions arising" on appeals to it, "and shall make separate findings of fact and conclusions of law," and "shall render its decision thereon," no hearing or proceedings of whatsoever nature were held on the new point permitted to be raised, no evidence therefore was presented or received thereon, nor did the Tax Court make the requisite findings of fact and conclusions of law. Six days after granting the aforesaid motion to amend, without waiting for the District's answers, if any, to the amended petitions, the Tax Court entered its findings of fact, opinion and decisions (R. 196, 199, 202, 205), holding the assessments against respondents to be erroneous and authorizing tax refunds. The Court of Appeals affirmed such action (Appendix A, *infra*, p. 7).

The taxes involved in the remaining cases were assessed after it was determined by the Assessor of the District that two gifts made by the decedent within two years prior to her death to her grandsons, Richard W. Fadeley and F. Mercer Fadeley, were made in contemplation of death under Section 1 (h) of the tax statute involved, *supra* (R. 118, Finding 23). The inheritance taxes were assessed against the donees, Richard W. Fadeley and F. Mercer

Fadeley but were not paid by them. Such taxes were paid by their father, Fenton M. Fadeley. (R. 95, Finding 1; R. 118, Findings 23, 24.) Sec. 3 of Title IX of the District of Columbia Revenue Act of 1937, as amended, *supra* (the Tax Court's governing statute), permits only a "person aggrieved" by an assessment "against him" to appeal from the assessment, provided *such person* shall "first pay such tax." Notwithstanding that these clear requirements of the statute were not complied with, the Tax Court assumed jurisdiction of the appeals to it by the donees, against whom the taxes were assessed, as well as of the appeal to it by Fenton M. Fadeley, father of the donees, who paid the taxes, but against whom such taxes had not been assessed. The Tax Court ignored the jurisdictional requirements of its governing statute and entered a consolidated decision (R. 130, 131) holding that the taxes involved were erroneously assessed against Richard W. Fadeley and F. Mercer Fadeley, and that Fenton M. Fadeley is entitled to a refund of such taxes. The Court of Appeals affirmed such action (Appendix A, *infra*, p. 7).

REASONS FOR GRANTING THE WRIT

1. This case is of greater importance than *District of Columbia* v. *Pace*, 320 U.S. 698, decided January 10, 1944, which this Court considered and decided because the scope of review of decisions of the Board of Tax Appeals for the District of Columbia (now known as the District of Columbia Tax Court) was important to the administration of the District's tax laws. This case not only embraces the scope of review of the Tax Court's decisions but also, and most important, whether failure of the Tax Court to conduct the hearing required by statute and to make findings of fact and conclusions of law, and to render its decisions on such findings of fact and conclusions of law as required by the Tax Court's governing statute, violates due process of law secured by the Fifth Amendment to

the Constitution of the United States. Although this question was raised and presented in the Court of Appeals (Appendix B, *infra*, p. 12, 13), that Court ignored the District's contention that the Tax Court's procedure, and lack of it, in these cases resulted in deprivation of property without due process of law secured by the Fifth Amendment to the Constitution of the United States. Section 3 of the Tax Court's governing statute, *supra* (p. 5, 6), specifically requires that Court to "hear and determine" all questions arising on appeals before it and to make "separate findings of fact and conclusions of law" and to render its decision "thereon". The amendments of the appeals to the Tax Court, permitted to be made by the Tax Court after trial of the cases, presented new questions upon which evidence was required to be taken. No hearing was held and, consequently, no evidence was taken. The new questions arising from the amendments permitted by the Tax Court required findings of fact and separate conclusions of law as to whether the decedent made a lifetime transfer of her partnership interests to the decedent, whether such a transfer, if made, was a "bona fide purchase", whether the transfer was, if a bona fide purchase, "for full consideration in money or money's worth" and, also, whether the respondents had exhausted their administrative remedies on these questions before the assessing authorities. No such findings of fact were made, and none could have been properly made, because the required hearing had not been held. The Tax Court's governing statute not only gives but requires a full hearing on questions before that Court which confers upon the parties the privilege of introducing evidence and, at the same time, imposes upon the Tax Court the duty of deciding such questions in accordance with the facts proved. The essential elements of due process of law are an opportunity to be heard and to defend in an orderly proceeding. Denial of these substantial rights to the District in these cases

clearly constitutes a deprivation of property without due process of law. In *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88, in which the foregoing principles were set forth, this Court stated (p. 91):

> "In the comparatively few cases in which such questions have arisen it has been distinctly recognized that administrative orders, quasi-judicial in character, are void if a hearing was denied; if that granted was inadequate or manifestly unfair; if the finding was contrary to the 'indisputable character of the evidence.'"

To the same effect see *Morgan* v. *United States*, 304 U.S. 1; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292, 300; and *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123.

This Court has further stated in *Hovey* v. *Elliott*, 167 U.S. 409, 414, that to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

The Court of Appeals justifies its action in affirming the Tax Court's decisions on an opening statement made by counsel for respondents in the Tax Court that "if a transfer of decedent's partnership interests did occur, it occurred when the partnership agreements were drawn up and it was made for a valuable consideration"; that although this point was not raised in the respondents' appeals to the Tax Court, the Tax Court, *after the hearing*, granted the respondents' motions to amend their petitions to include "this consideration argument"; that the Tax Court observed that the respondents had urged "the con-

sideration argument" in the opening statement without objection by the District; that the issue was discussed in their brief; and that the partnership agreements which were the only evidence necessary to support *this argument* were received in evidence without objection (Appendix A, *infra*, p. 6). Cases are to be tried on the issues raised and the facts adduced in respect thereof. The District, in its brief, as the Tax Court pointed out (R. 150), "did not reply to the argument" on consideration. Of course no reply was necessary or proper because the point was not before the Tax Court and had not been heard by that Court. This is amply clear from the discussion on the matter on August 9, 1955, after the hearing on the issue of valuation (R. 141-147), during the course of which counsel for the District stated (R. 144-145): "I wanted to make our position clear here. There has never been any indication on the part of the District, as indicated by counsel for the petitioners, that we were trying any issues that were not raised in the petition in this case * * *." Thereafter at the conclusion of the aforesaid conference, the Tax Court, itself, concluded that even the alleged issue of "valuable consideration" referred to in the Court of Appeals' opinion (App. A, p. 6) and by the Tax Court during the conference (R. 146) had not been raised (R. 147). No issue is presented in any case under the District inheritance tax law, which excludes transfers from decedents "in cases of a bona fide purchase for full consideration in money or money's worth", merely by the assertion in an opening statement that a "valuable consideration" was paid "if a transfer did occur". There is no question in these cases that a transfer did occur from the decedent to the respondents after, and as a result of, the decedent's death and then only because the decedent's death brought to fruition the provisions, testamentary in character, contained in the agreement and

quoted, *supra* (p. 9). The assertion by the District of Columbia Tax Court (R. 150), adopted by the Court of Appeals (Appendix A, *infra*, p. 6), that the partnership agreement was the only evidence necessary to support the respondents' contention that a "valuable consideration" had been paid, not only does not meet the question presented but is patently erroneous, since it is obvious that the partnership agreement, while it might present some evidence on the question presented, could not preclude the possibility of other and better evidence bearing upon it. These are matters of evidence which should have been, but were not, presented to and considered by the Tax Court because no hearing was held on the questions by that Court.

2. The Court of Appeals, in Footnote 8 of its opinion (Appendix A, *infra*, p. 6), states that there is no support for the District's argument that the Tax Court could not consider points which were raised in the respondents' opening statement and in their brief and which were included in amended petitions, citing as authority therefor Rule 11 of the Rules of Procedure before the Tax Court, *supra*, which permits amendment "to make the pleadings conform to the evidence". The District did not contend before the Court of Appeals that the Tax Court could not consider a point raised by an amendment filed pursuant to the Tax Court's Rule 11. The District's contention in this respect is restated herein, quoted from the District's brief filed in the Court of Appeals (p. 60 of that brief):

> "The first clear error committed by the Tax Court was granting respondents' motions to amend at such late date. There is no authority under the Tax Court's rules of procedure for amendment of pleadings to raise new issues after trial except under Rule 11(b) which provides that

> when issues not raised by the pleadings are "tried by express or implied consent of the parties" they will be treated in all respects as if they had been raised in the pleadings, and that the pleadings may be amended at any time, on motion, to raise these new issues. The motion for leave to amend, filed by respondents August 23, 1955 (J.A. 147), to raise the new issue (J.A. 150, 151) did not assert that the proposed amendments were intended to raise a new issue which had been tried by express or implied consent and, in fact, could not have given such a reason because neither the Tax Court nor counsel for the District had any such understanding (J.A. 144, 145) as late as August 9, 1955, after trial of the cases. * * *"

The contentions of counsel for the District on this matter before the Court of Appeals were summed up on pages 9 and 10 of the District's reply brief, as follows, which we adopt herein:

> "Under this posture of the cases, wholly aside from any question whether the Tax Court properly permitted the amendments referred to, it was mandatory under Sec. 47-2403, D.C. Code, 1951, that the Tax Court 'hear and determine' the new question thus raised in the appeals pending before it in the manner prescribed in the statute. At such a hearing it would have been obligatory upon respondents to show by a preponderance of evidence that, as between them and the decedent, there had been 'a bona fide purchase for full consideration in money or money's worth' to bring the transfers here involved within the exempting

clause of Sec. 47-1601, D.C. Code, 1951; and, at such a hearing, the District would have been entitled to rebut such evidence by evidence of its own, as well as to show that the respondents had not exhausted their administrative remedies as required by law. No hearing of whatsoever nature was held by the Tax Court on the new issue it permitted to be raised after trial (District Brief, pp. 22, 62, 63), yet the Tax Court determined the question (1) by holding that the Assessor's appraisal of market value, as required by statute, which included the value of the interests transferred to the respondents herein, had not been overcome and should not be disturbed, and (2) by holding erroneous the assessments made and authorizing tax refunds to the respondents. Such procedure clearly does not comply with the Constitutional requirement of due process of law under the Fifth Amendment to the Constitution of the United States."

3. The District further contended before the Court of Appeals that the Tax Court's decisions were erroneous because that Court did not make proper findings of fact and separate conclusions of law as required by law (Appendix B, *infra*, p. 12). The Court of Appeals disposed of the District's contentions in these respects by stating that such contentions ignored the fact that "no statute or rule dictates any rigid formula for findings of fact, conclusions of law and opinions" (Appendix A, *infra*, p. 7). Section 3 of the Tax Court's governing statute, *supra* (p. 5, 6), specifically requires that Court to make "separate findings of fact and conclusions of law". This, the Tax Court did not do. It entered findings of fact and an opinion (R. 151-194). The Judge of the Tax Court, in failing to make separate findings of fact and conclusions

of law as required by statute, purports to act under a new rule adopted November 12, 1952 (Rule 34, *supra*), which provides that conclusions of law may be stated separately in numbered paragraphs or may be incorporated in the opinion of the Court. The District would not feel aggrieved, nor consider that the Tax Court had failed to comply with its governing statute relating to conclusions of law if that Court had incorporated conclusions of law, separately stated as required, in its opinion, so that it could be known precisely what the Court's conclusions of law were. This it did not do. Section 8 of the Tax Court's governing statute, *supra* (p. 6), authorizes that Court only to promulgate "rules of procedure". Its Rule 34, *supra*, adopted November 12, 1952, is not a rule of procedure; it is an attempt to nullify plain and unambiguous statutory requirements designed to secure to the respective parties in tax cases orderly due process of law so that they may be adequately apprised of the specific findings of fact and conclusions of law and thus be enabled to present their grievances, if any, to the Court of Appeals for review of the Tax Court's decisions. A rule adopted either by an adminstrative agency or by a Court must not contravene a statute, and any rule so adopted which conflicts with statutory provisions is without force. *Johnson* v. *Manhattan R. Co.*, 289 U.S. 479; *General Electric Co.* v. *Marvel Rare Metals Co.*, 287 U.S. 430; *Steinmetz* v. *Allen*, 192 U.S. 543, 565.

The District also attacked on review in the Court of Appeals such findings of fact as were made by the Tax Court in these cases because they were, for the most part, merely quotations from testimony and exhibits (see R. 95-118 and R. 152-169). The Tax Court's procedure in reciting the evidence in its findings was in direct conflict with the decision of the Court of Appeals below in *Bishop* v. *United States*, 96 U.S. App. D.C. 117, 223 F. 2d 582, decided February 18, 1955, holding that a trial judge

should not recite the evidence upon which he bases a finding, as well as in conflict with the decision of the Second Circuit in *Petterson Lighterage & Towing Corp.* v. *New York Central R. Co.* (CCA 2, 1942), 126 F. 2d 992. Other decisions of the Court of Appeals below were not followed in deciding these cases, notably, *Rice et al.* v. *United States,* 85 U.S. App. D.C. 404, 179 F. 2d 26; *Larsen* v. *Marzall,* 90 U.S. App. D.C. 260, 195 F. 2d 200; *American Broadcasting Co.* v. *Federal Communications Commission,* 85 U.S. App. D.C. 343, 179 F. 2d 437; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 68 App. D.C. 282, 96 F. 2d 554, cert. denied 305 U.S. 613. The decision of the Court of Appeals in these cases is also in conflict with *Shapiro* v. *Rubens* (CCA 7, 1948), 166 F. 2d 659, holding that failure to find a fact essential to recovery is equivalent to a finding against the party having the burden of proving it; *Woods* v. *Turner* (CCA 10, 1949), 172 F. 2d 313, holding that the absence of a finding material to the issue presented is equivalent to a finding against the plaintiff having the burden of proof; and *United States* v. *Forness, et al.* (CCA 2, 1942), 125 F. 2d 928, 942, where the Court stated that the judiciary properly holds administrative officers to high standards in the discharge of the fact finding function, and that the judiciary should at least measure up to the same standards.

Furthermore, the Tax Court and the Court of Appeals, in deciding these cases solely on the partnership agreement, without other material evidence, followed a wholly inapplicable principle of Federal estate tax law that where a decedent has given an option to sell at a specified price *the value of a decedent's interest in an entity can be included in his gross estate at no more than the option price.* This was the principle established in *Wilson* v. *Bowers* (CCA 2, 1932), 57 F. 2d 682, followed by the Tax Court (R. 193), which was applied by the Federal Tax Court in *Bensel* v. *Commissioner,* 36 B. T. A. 246, on which the

Court of Appeals relied (Appendix A, *infra*, p. 7). *In the partnership agreement here involved there was no option to buy or sell any partner's interest at a specified price* upon death or withdrawal of a partner. Insofar as the decedent was concerned, the surviving partners (the respondents) took all of her partnership interest after her death in excess of her capital account *without payment of any amount whatever* to her estate.[3] The *valuation question* in these cases was decided against the respondents, as pointed out *infra*. Thus the decision of the Court of Appeals even in this respect is in conflict with decisions of other Federal courts thereon.

The conflicts above set forth are important to administration of Federal and District tax laws and should be resolved by this Court.

5. The decision of the Court of Appeals on the matter of whether the Tax Court had jurisdiction over the three remaining cases is contrary to law, contrary to prior decisions of the Court of Appeals on the jurisdictional point, and contrary to the decisions of this Court. Jurisdiction is a matter of power, and when a case is not within the law it is not within the jurisdiction of the Court. *Lamar* v. *United States*, 240 U.S. 60, 64. Section 3 of the Tax Court's governing statute, *supra* (p. 5), authorizes an appeal from any inheritance tax assessment by any person aggrieved by such an assessment *against him*, provided *such person* shall first *pay such tax*. The persons assessed did not pay such taxes. Therefore, the Court of Appeals stated in Footnote 4 of its opinion (Appendix A, *infra*, p. 4) they "should not be allowed to appeal the assessment". Yet the Court of Appeals affirmed the decision of the Tax Court in those appeals holding the assessments erroneous.

[3] The only obligation each surviving partner had was to keep a capital account at all times of at least $1,000 for every percent of partnership interest (Statement of the case, *supra*, p. 8).

In permitting the residuary legatee under the will to maintain an appeal and recover the taxes assessed against the donee-grandsons of the decedent, the Court of Appeals took the view that although "the tax was technically not assessed against the residuary legatee, for all practical purposes the assessment was against him and, therefore, he can appeal under this statute" (Appendix A, *infra*, p. 4). The Court of Appeals ignored the fact that the assessments involved were made against the donees for *inter vivos* transfers from the decedent to them which were thereafter specifically excluded from the decedent's will by codicil (R. 115, 116, Finding 21) and, consequently, the residuary legatee's share of the estate could not have been reduced by the amounts of the taxes because neither the decedent's estate nor the residuary legatee was liable for such taxes. The Court of Appeals referred to *National Bank of Washington* v. *District of Columbia*, 96 U.S. App. D.C. 395, 226 F. 2d 759, (Appendix A, *infra*, p. 4) wherein it had held that an executor is not a "person aggrieved" for purposes of an appeal to the Tax Court unless the "estate as a whole" is directly affected and "liable for the tax," and came to the conclusion that, under the District's contention, the result would be that where a will provides for the payment of succession taxes out of the corpus of the estate, *no one* can appeal an assessment to the Tax Court under the statute involved (Appendix A, *infra*, p. 3). Such a result could not exist because (1) if the estate is liable for the taxes in any case the executors, under *National Bank of Washington* v. *District of Columbia, supra*, could maintain an appeal, and (2) individual beneficiaries can maintain appeals to the Tax Court by following the procedure prescribed by the statute. Private arrangements between persons as to payment of inheritance taxes assessed certainly cannot under the statute, and the decision of the Court of Appeals in these cases ought not, permit tax litiga-

tion in the Tax Court when not authorized.[4] All persons are charged with knowledge of the provisions of statutes and must take note of the procedure adopted by them. *North Laramie Land Co.* v. *Hoffman*, 268 U.S. 276, 283. To permit the residuary legatee under the will to maintain his appeal from the assessments made against the *inter vivos* donees of the decedent in these cases completely disregards the statutory requirements for appeals to the Tax Court and in effect would amend the Tax Court's governing statute so as to permit appeals by "any person who pays the tax assessed" without regard to whether such person has been assessed or is liable for the tax. This result is contrary to the decision of the Court of Appeals in *Story* v. *Snyder, et al.*, 87 U.S. App. D.C. 96, 184 F. 2d 454, cert. denied 340 U.S. 866, where the Court stated that it is not within the judicial function to rewrite a statute so that it will authorize what the court thinks should be authorized. Such result is also contrary to *District of Columbia* v. *McFall*, 88 U.S. App. D.C. 217, 188 F. 2d 991, where the Court of Appeals stated that the Tax Court's jurisdictional requirements cannot be ignored.

It is plain from the foregoing that the District has been deprived of due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States, in respect of the taxes assessed, and that other plain errors adversely affecting the District's substantial rights were committed by the Tax Court in making and entering its decisions, and by the Court of Appeals in affirming such decisions, which this Court should correct.

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[4] The common law remedy for recovery of taxes is still available in the District. *Linder* v. *District of Columbia*, (D.C. Mun. Ct. App.), 32A. 2d 540; Sec. 4(c), Act of July 10, 1952, 66 Stat. 546, ch. 649 (Sec. 47-2413(c), D.C. Code, 1951, Supp. III).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12924

DISTRICT OF COLUMBIA, PETITIONER

v.

FENTON M. FADELEY, RESPONDENT.

No. 12925

DISTRICT OF COLUMBIA, PETITIONER

v.

RICHARD W. FADELEY, RESPONDENT.

No. 12926

DISTRICT OF COLUMBIA, PETITIONER

v.

F. MERCER FADELEY, RESPONDENT.

No. 12978

DISTRICT OF COLUMBIA, PETITIONER

v.

FENTON M. FADELEY, RESPONDENT.

No. 12979

DISTRICT OF COLUMBIA, PETITIONER

v.

PATRICK A. DECK, RESPONDENT.

No. 12980

DISTRICT OF COLUMBIA, PETITIONER

v.

CHESTER A. BLINSTON, RESPONDENT.

No. 12981

DISTRICT OF COLUMBIA, PETITIONER

v.

DOLORES U. FADELEY, RESPONDENT.

Petitions for Review of Decisions of the District of Columbia Tax Court

Decided June 7, 1956

244 *Mr. George F. Donnella,* Assistant Corporation Counsel for the District of Columbia, with whom *Messrs. Vernon E. West,* Corporation Counsel, *Chester H. Gray,* Principal Assistant Corporation Counsel, and *George C. Updegraff,* Assistant Corporation Counsel, were on the brief, for petitioner. *Mr. Hymie Nussbaum,* Assistant Corporation Counsel, also entered an appearance for petitioner.

Mr. Charles T. Akre, with whom *Mr. John M. Bixler* was on the brief, for respondents.

Before PRETTYMAN, DANAHER and BURGER, *Circuit Judges.*

BURGER, *Circuit Judge:* Ellen Fadeley died in April 1953 at age 84. Her executors reported on the federal estate tax return, a copy of which was filed with the District of Columbia inheritance tax return, two inter vivos gifts of $25,000 each which were made to decedent's two grandsons in February 1952; the executors asserted these gifts were not made in contemplation of death. The District of Columbia Assessor, however, held the gifts had been made in contemplation of death[1] and assessed

[1] § 47-1601(a), D.C.CODE (1951), imposes inheritance taxes on gifts made in contemplation of death.

inheritance taxes against the two grandsons. Since decedent's will directed that succession taxes be paid out of the corpus of the estate, Fenton Fadeley, decedent's son and the residuary legatee, paid the taxes assessed against the grandsons. Fenton Fadeley and the two grandsons then filed three separate petitions in the District of Columbia Tax Court for a refund of the
245 taxes.[2] The Tax Court granted the refund, holding that the gifts were not made in contemplation of death.

This decision was appealed by the District of Columbia in cases 12924, 12925 and 12926. These three cases involve two issues, (1) whether the residuary legatee, who paid the assessment, and the donees of the inter vivos gifts, against whom the taxes were assessed but who did not pay them, can appeal to the Tax Court from the District Assessor's determination, and (2) whether the inter vivos gifts were made in contemplation of death.

The statute concerning appeals to the Tax Court from tax assessments provides:

> Any person aggrieved by any assessment by the District against him of any . . . taxes, or penalties thereon, may, within ninety days after notice of such assessment, appeal from such assessment to the board, provided such person shall first pay such tax, together with penalties and interest due thereon, to the collector of taxes of the District of Columbia . . . (§47-2403, D.C. Code (Supp. III, 1951).)

Petitioner contends that the donee-grandsons cannot appeal to the Tax Court because they did not pay the tax and the residuary legatee cannot appeal because, although

[2] The taxpayers stated before the Tax Court that the three petitions were filed because it was uncertain who was entitled to bring the action.

he paid the tax, the tax was not assessed against him. Since this court held in *National Bank of Washington* v. *District of Columbia*[4] that as a general rule an executor was not a "person aggrieved" for purposes of an appeal to the Tax Court, the obvious result of petitioner's argument is that in a situation where the will provides for the payment of succession taxes out of the corpus of the estate, *no one* can appeal an assessment to the Tax Court under this statute. That could not have been intended and must not be allowed. The residuary legatee has paid the tax and since the tax reduces the amount which
246 he will receive under the will, he is the one whose "individual interests are directly and personally affected" by the assessment and is thus the "person aggrieved" by the assessment. *National Bank of Washington* v. *District of Columbia, supra,* at 761. Although the tax was technically not assessed against the residuary legatee, for all practical purposes the assessment was against him and, therefore, he can appeal under this statute.[4]

On the contemplation of death issue, we believe the Tax Court's finding that the gifts to the two grandsons were based on life motives is adequately supported and there is no basis for disturbing that finding. The desire to aid the business and home-making aspirations of grandchildren is a proper life motive for such gifts as these.[5] Advanced age alone does not establish contemplation of death.

The purposes here had long been contemplated and were frustrated by the advice of the parent of the donees, one of the very persons who normally (and properly) might urge tax-saving devices. The donor's desire to

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[3] 96 U.S. App. D.C. 395, 226 F. 2d 759 (1953).

[4] The donee-grandsons did not pay the tax and, therefore, should not be allowed to appeal the assessment. However, petitioner was not prejudiced since the Tax Court ordered only one refund to the residuary legatee and there was no "double recovery."

[5] *United States* v. *Wells*, 283 U.S. 102, 118 (1931).

make these gifts in 1945 was not carried out because Fenton Fadeley felt his sons (ages 16 and 20) were too young to have $25,000 each. The fact that the execution of the inter vivos gifts in 1952 was accompanied by a pro tanto reduction of testamentary bequests to the grandsons was a coincidence flowing from the employment of the will in 1945 to accomplish what the donor wanted to accomplish by inter vivos gifts at that time. The testamentary coloration of the gifts is, therefore, only superficial.

247 The second group of cases (12978, 12979, 12980, 12981) relates to different issues. Decedent's executors also included in the inheritance tax return decedent's interests in four partnerships, valuing these interests at $108,117.95. The partners, in addition to decedent, were Fenton Fadeley, Chester Blinston, Patrick Deck and Dolores Fadeley. Each partnership agreement provided that decedent would receive 22-2/3% of the profits of the business and this percentage could neither be increased nor decreased even though new partners were taken in or the number of partners reduced; on the death of any partner, the partner's estate would remain a partner until the end of the calendar year, at which time the deceased partner's capital account would be credited with the year's profits and the capital account would then become the property of the partner's executors; at the end of the calendar year in which decedent died the remaining partners would reform the partnership so that there would be added to each of the original partner's percentage that portion of 22-2/3% divided by the number of living original partners; Chester Blinston, Patrick Deck and Dolores Fadeley were to become partners because of services as employees (described as "invaluable" in the agreement) and because Fenton Fadeley would have less time for partnership management. Decedent performed no services for the partnerships.

The Assessor capitalized average partnership profits for the years 1948-1952 and determined that each of the surviving partners had received $25,896.92,[6] thus increasing to $211,705.63 the value of the partnership interests owned by decedent at her death. After paying the additional taxes so assessed, the partners sought refunds in the Tax Court.

248 In opening their case in the Tax Court, counsel for the partner-taxpayers stated it was their contention that if a transfer of decedent's partnership interests did occur, it occurred when the partnership agreements were drawn up and it was made for a valuable consideration.[7] This was a point not raised in the taxpayers' petitions. After the hearing, however, the Tax Court granted taxpayers' motions to amend the petitions to include this consideration argument. The court observed that the taxpayers had urged the consideration argument in the opening statement without objection by the District, the issue was discussed in their briefs, and the partnership agreements, which were the only evidence necessary to support this argument, were received in evidence without objection.

The Tax Court granted the refunds, holding that there was full consideration for the transfer of decedent's partnership interests to the taxpayers as surviving partners. The District of Columbia appealed this decision in cases 12978, 12979, 12980 and 12981.[8]

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[6] These sums were asserted to represent decedent's interest in the "good will" of the partnerships.

[7] Under §47-1601(a), D.C.CODE (1951), a transfer to take effect in possession or enjoyment after the death of the decedent is not taxable if it was made for full consideration in money or money's worth.

[8] There is no support for petitioner's argument that the Tax Court could not consider points which were raised in taxpayers' opening statement and in taxpayers' brief and which were included in amended petitions. Rule 11, Rules of Procedure before the District of Columbia Tax Court, permits amendment, even after the decision, to make the pleadings conform to the evidence.

Petitioner asserts that the decedent made a transfer of her partnership interests to the surviving partners for less than full consideration in money or money's worth in that decedent gave more than she received in the bargain contracted with her partners. This argument overlooks several factors. Decedent was assured by the agreement of an income for life,[9] partly no doubt because of the very prospect that the surviving partners would succeed to her interests pursuant to the agreement. She became in a limited sense an annuitant and the other partners were underwriters who assumed certain calculated risks in making the agreement. Depending on her life span, the agreement could have worked out less favorably for the survivors than it did. Thus the case involves reciprocally restrictive agreements, like those in *Bensel* v. *Commissioner*, 36 B.T.A. 246 (1937) aff'd, 100 F.2d 639 (3d Cir. 1938), and decedent was not in the "all burdens—no benefits" position which led this court to find failure of consideration in *O'Connor* v. *District of Columbia*, 80 U.S.App.D.C. 351, 153 F.2d 225 (1946). It cannot be said that this agreement transgressed any prohibitions of the taxing statute or that it was an evasive device.

249

Petitioner's attack on the form of the Tax Court's findings and opinions ignores the fact that no statute or rule dictates any rigid formula for findings of fact, conclusions of law and opinions; what is desirable for one case does not fit another. "It is enough that the findings, taken together, give us 'a clear understanding of the basis of the decision'." *Minnesota Mining & Manufacturing Co.* v. *Coe*, 75 U.S.App.D.C. 131, 132, 125 F.2d 198, 199 (1941).

The decisions of the Tax Court are

Affirmed.

[9] Decedent was the only partner whose percentage of profits could not be decreased.

251 UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUI

No. 12,924

APRIL TERM, 1956

Docket 1470

DISTRICT OF COLUMBIA, PETITIONER,

v.

FENTON M. FADELEY, RESPONDENT.

No. 12,925

APRIL TERM, 1956

Docket 1471

DISTRICT OF COLUMBIA, PETITIONER,

v.

RICHARD W. FADELEY, RESPONDENT.

No. 12,926

APRIL TERM, 1956

Docket 1472

DISTRICT OF COLUMBIA, PETITIONER,

v.

F. MERCER FADELEY, RESPONDENT.

No. 12,978

APRIL TERM, 1956

Docket 1473

DISTRICT OF COLUMBIA, PETITIONER,

v.

FENTON M. FADELEY, RESPONDENT.

No. 12,979
April Term, 1956
Docket 1474
District of Columbia, petitioner,
v.
Patrick A. Deck, respondent.

No. 12,980
April Term, 1956
Docket 1475
District of Columbia, petitioner,
v.
Chester A. Blinston, respondent.

No. 12,981
April Term, 1956
Docket 1476
District of Columbia, petitioner,
v.
Dolores U. Fadeley, respondent.

On Petitions for Review of Decisions of the District of Columbia Tax Court.

Before: Prettyman, Danaher and Burger, *Circuit Judges.*

JUDGMENT

These cases came on to be heard on the records from the District of Columbia Tax Court, and were argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this Court that the decisions of the said Tax Court on review herein be, and the same are hereby, affirmed, with costs.

Dated: June 7, 1956.

Per Circuit Judge BURGER.

225 APPENDIX B

D. C. Tax Court
Docket No. 1470

DISTRICT OF COLUMBIA, PETITIONER,

v.

FENTON M. FADELEY, RESPONDENT.

STATEMENT OF POINTS ON REVIEW

1. The District of Columbia Tax Court did not have jurisdiction because the respondent (petitioner below) is not a person aggrieved by an assessment of inheritance tax against him.

2. The District of Columbia Tax Court erred in finding that the transfer on February 15, 1952 by the decedent Ellen H. Fadeley of the sums of $25,000 each to Richard W. Fadeley and F. Mercer Fadeley was not made in contemplation of death. The District of Columbia Tax Court further erred in concluding that the decedent did not intend the gifts as a substitute for a testamentary disposition.

3. The District of Columbia Tax Court did not make separate findings of fact and conclusions of law as required by law. The conclusion of said Tax Court in Finding of Fact numbered 25, to the effect that the transfers of money to Richard W. Fadeley and F. Mercer Fadeley from the decedent were not made in contemplation of death, is not based on substantial or competent evidence and is
226 clearly erroneous if such conclusion is considered to be a finding of fact. Such conclusion is, for the

same reasons, invalid and contrary to law if it is considered to be a conclusion of law.

4. The decision of the District of Columbia Tax Court is invalid and of no force and effect because it does not conform to the requirements of law.

227, 229

D. C. Tax Court

Docket Nos. 1471 and 1472

DISTRICT OF COLUMBIA, PETITIONER,

v.

RICHARD W. FADELEY and F. MERCER FADELEY, RESPONDENTS.

STATEMENT OF POINTS ON REVIEW *

1. The District of Columbia Tax Court did not have jurisdiction because the respondent (petitioner below) is not a person aggrieved by an assessment of inheritance tax against him in that such tax was not paid by him as required by law.

2. The District of Columbia Tax Court erred in finding that the transfer on February 15, 1952 by the decedent Ellen H. Fadeley of the sums of $25,000 each to Richard W. Fadeley and F. Mercer Fadeley was not made in contemplation of death. The District of Columbia Tax Court further erred in concluding that the decedent did not intend the gifts as a substitute for a testamentary disposition.

3. The District of Columbia Tax Court did not make separate findings of fact and conclusions of law as required by law. The conclusion of said Tax Court in Finding of Fact numbered 25, to the effect that the transfers of money to Richard W. Fadeley and F. Mercer Fadeley from the decedent were not made in contemplation of death, is not based on substantial or competent evidence and is clearly

*All points in these cases are identical and have been consolidated to avoid duplication.

erroneous if such conclusion is considered to be a
228, 230 finding of fact. Such conclusion is, for the same reasons, invalid and contrary to law if it is considered to be a conclusion of law.

4. The decision of the District of Columbia Tax Court is invalid and of no force and effect because it does not conform to the requirements of law.

231, 234, 237, 240 D. C. Tax Court

Docket Nos. 1473, 1474, 1475 and 1476

DISTRICT OF COLUMBIA, PETITIONER,

v.

FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, and DOLORES U. FADELEY, RESPONDENTS

STATEMENT OF POINTS ON REVIEW *

1. The only question presented to the District of Columbia Tax Court for decision was the valuation of the decedent's partnership interests transferred at death. The District of Columbia Tax Court, having determined that there was no testimony sufficient to overcome the presumption of the value of such interests, clearly erred in entering a decision that District of Columbia inheritance taxes based upon such value were erroneously assessed and in authorizing a refund of such taxes, with interest.

2. The District of Columbia Tax Court did not make separate findings of fact and conclusions of law as required by law. The said Tax Court clearly erred in not making either a finding of fact or a conclusion of law to support that Court's decision and, consequently,
232, 235, 238, 241 such decision is erroneous and should be reversed.

*All points on review in these cases are identical and have been consolidated to avoid duplication.

3. The District of Columbia Tax Court clearly erred in holding that the decision of the United States Court of Appeals for the District of Columbia Circuit in *The National Bank of Washington* v. *District of Columbia,* 85 U.S. App. D.C. 187, 176 F. 2d 62, has been overruled and, as a result thereof, in entering a decision that the taxes involved were "erroneously assessed" upon an alleged issue not properly raised or tried in the Tax Court.

4. The District of Columbia Tax Court clearly erred in entering the decision in this case without compliance with that Court's governing statute relating to findings of fact and conclusions of law, in entering such decision contrary to the procedure prescribed by the mandate of the United States Court of Appeals for the District of Columbia Circuit, and in entering such decision upon a point not properly raised or tried in said Tax Court, and as a result thereof said decision is erroneous because it deprives the petitioner of property without due process of law in violation of the Fifth Amendment to the Constitution of the United States.

5. The District of Columbia Tax Court erred in determining that the transfer of decedent's partnership interests at death were made for full consideration and in entering a decision, as a result of such determination, that the taxes involved were erroneously assessed.

AUG 2 2
JOHN T. FEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 277

DISTRICT OF COLUMBIA,
Petitioner,

v.

FENTON M. FADELEY, RICHARD W. FADELEY, F. MERCER FADELEY, FENTON M. FADELEY, PATRICK A. DECK, CHESTER A. BLINSTON, and DOLORES U. FADELEY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Statement 3

Reasons for Denying the Writ 6

Conclusion 9

CITATIONS

Cases:

Benzel, Edith M., 36 B.T.A. 246 (1937) 6

Broderick v. *Gore*, 224 F. 2d 892 (C.A. 10 1955) 6,7

District of Columbia v. *Pace*, 320 U. S. 698 (1944) 8

Goodacre v. *Panagopolous*, 110 F. 2d 716 (C.A. D.C. 1940) 8

Green Valley Creamery, Inc., v. *United States*, 108 F. 2d 342 (C.A. 1 1939) 9

Minnesota Mining & Manufacturing Co. v. *Coe*, 125 F. 2d 198 (C.A. D.C. 1941) 8

National Bank of Washington v. *District of Columbia*, 226 F. 2d 759 (C.A. D.C. 1953) 9

Shellman v. *Shellman*, 95 F. 2d 108 (C.A. D.C. 1938) 8

Weil, Estate of Lionel, 22 T.C. 1267 (1954) 6

Wilson v. *Bowers*, 57 F. 2d 682 (C.A. 2 1932) 6

Statutes:

United States Code, 1952
Title 28, Section 1254(1) 2

District of Columbia Code, 1951
Section 47-2403 (printed in Petition, p. 5) 6,8
Section 47-2408 (printed in Petition, p. 5) 8

Miscellaneous:

Rules of the District of Columbia Tax Court
Rule 34 (printed in Petition, p. 8) 8

In The

Supreme Court of the United States

October Term, 1956

No. 277

District of Columbia,
Petitioner,

v.

Fenton M. Fadeley, Richard W. Fadeley, F. Mercer Fadeley, Fenton M. Fadeley, Patrick A. Deck, Chester A. Blinston, and Dolores U. Fadeley,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of facts and the opinions of the District of Columbia Tax Court are not reported in an official reporter, but they may be found in the Record, pp. 94-130 and pp. 151-194, and in Commerce Clearing House, Inheritance Estate and Gift Tax Reporter, paragraphs 18,396 and

18,423. The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 233 F. 2d 667 (C.A.D.C. 1956) and reproduced in Appendix A, pp. 1-7, of the Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on June 7, 1956. The jurisdiction of this Court is being invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District of Columbia Tax Court deprived the petitioner of property without due process of law by deciding an issue against the petitioner under these circumstances:

(a) The District of Columbia Tax Court based its decisions on an issue that was (i) pleaded generally in the petitions, (ii) presented specifically in the taxpayers' opening statement, (iii) supported by a written partnership agreement introduced by the taxpayers at the hearing without objection by the petitioners, (iv) specifically argued in the taxpayers' brief as an issue of law,

(b) The District of Columbia Tax Court in accordance with its rules of procedure permitted the taxpayers to amend their petitions after the hearing on the merits in order to plead this issue expressly,

(c) The District of Columbia Tax Court did not grant a hearing after the amendment of the petitions, having previously notified the petitioner that the issue involved would be decided on the basis of the partnership agreement,

(d) The petitioner never requested a hearing or rehearing nor indicated that it had evidence to introduce,

(e) The District of Columbia Tax Court made separate findings of fact; its conclusions of law were incor-

porated in its opinions. The opinion of the Court of Appeals for the District of Columbia Circuit shows that Court had a clear understanding of the basis of the Tax Court's decisions.

2. Whether the residuary legatee, having paid the inheritance tax, can appeal under the District of Columbia statute permitting only the aggrieved person who pays the tax to appeal, where his share of the estate was required by the terms of the will to be diminished by the payment of all succession taxes.

STATEMENT

The United States Court of Appeals for the District of Columbia Circuit (hereafter called the Court of Appeals) affirmed the decisions of the District of Columbia Tax Court (hereafter called the Tax Court) in these cases, and ordered refunds of District of Columbia inheritance taxes (Petition Appendix A, pp. 1-7).

As detailed below, four of these cases concern decedent's partnership interests; three of the cases involve only the question as to who can appeal to the Tax Court. The cases were consolidated for hearing before the Tax Court (R. 3).

1. The executors of the decedent's will included in the District of Columbia inheritance tax return the decedent's interests in four partnerships, valuing these interests at $108,117.95. There is no dispute about this item. Under the partnership agreement, on the death of a partner, his estate was entitled only to his capital account balance as shown on the books of the partnership—in this instance the above amount, the result being that any good will continued in the surviving partners. The Assessor for the District of Columbia determined that the decedent's interests in the partnerships, in addition to her interest in the capital account, included good will which he valued at $103,587.68 and taxed it as a testamentary transfer to

the surviving partners (R. 164-168). After paying the taxes thus assessed against them, the partners sought refunds in the Tax Court (R. 135-140).

The petitions filed with the Tax Court contained allegations that the assessments were erroneous and raised the question whether there was a transfer testamentary in character,

> "b. The Assessor of the District of Columbia incorrectly determined that the partnership agreement drawn December 31, 1947, and signed by Ellen H. Fadeley, Fenton M. Fadeley, Dolores U. Fadeley, Chester A. Blinston and Patrick A. Deck, is a testamentary instrument by which Ellen H. Fadeley's partnership interests passed at her death to surviving partners.
>
> "c. The Assessor of the District of Columbia incorrectly determined that on the death of Ellen H. Fadeley there was transferred to Fenton M. Fadeley, Dolores U. Fadeley, Chester A. Blinston and Patrick A. Deck, Ellen H. Fadeley's interest in partnership goodwill." (R. 136.)

Thus the petitioner is in error when he states that the only issue raised in the appeals was the correct value of the interests transferred. (Petition p. 2)

In his opening statement, counsel for the taxpayers contended that, if a transfer of decedent's partnership interest was made (to the surviving partners), it was made for a valuable consideration by or with mutual promises (R. 2, 3). The partnership agreement was introduced without objection from the District (R. 80, 83, 148-150).

The taxpayers on brief argued, among other things, that the decedent had not made taxable transfers, since any transfer that was made to these parties was made for a full consideration in money or money's worth (R. 149-150). In its brief the District did not answer or comment on this argument (R. 148-150).

The Tax Court, because of doubt as to whether the petitions covered or should have covered this position, requested

the parties to file memoranda thereon.[1] Although counsel for the taxpayers was of the opinion that the petitions adequately covered this point (R. 141, 143, 144, 145), a motion was made for leave to amend to include specifically an allegation that, if a transfer was made, it was made for full consideration (R. 148). The District filed a memorandum in opposition to this motion (R. 196). The motion to amend the petitions was granted (R. 149-151).

The District at no time suggested to the Tax Court that it had any evidence to present on this consideration issue and at no time requested a further hearing.

The Tax Court held that the transfer of decedent's partnership interest was made for full consideration because of the reciprocal covenants in the partnership agreement and that the taxpayers were entitled to a refund of the taxes erroneously assessed (R. 151-194). The District did not request a rehearing. On appeal the Court of Appeals affirmed the Tax Court's decisions (Petition Appendix A, pp. 1-7).

2. In the remaining three cases the only question is as to what persons could appeal from a determination by the District of Columbia Assessor that *inter vivos* gifts made by decedent to two of her grandsons were made in contemplation of death (R. 118).

Item I of the decedent's will provided (R. 118):

> "I direct my Executors hereinafter named to pay all of my just debts, funeral expenses without regard to the legal limitation in force in the District of Columbia and succession taxes out of the corpus of my estate." (R. 118.)

Item V of the decedent's will bequeathed and devised the

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[1] "THE COURT: * * *

"The point that I am interested in today is: Whether or not I have a right to consider the point you make that valuable consideration was paid for the transfer.

"Suppose you have a memorandum, and then, when you complete it—let us say within a week—send a copy to Mr. Updegraff and let him answer?" (Tr. in Tax Court, p. 223.)

residue of the decedent's estate to Fenton Fadeley, the decedent's son. The decedent's executors paid the estate residue to Fenton Fadeley, who in turn paid all inheritance taxes, including the taxes assessed against the two grandsons, F. Mercer Fadeley and Richard W. Fadeley (R. 118). Fenton Fadeley's payment of these inheritance taxes reduced the residuary estate received by him. Fenton Fadeley and the two grandsons filed petitions in the Tax Court (R. 119, 132).

The Tax Court held that the transfers were not made in contemplation of death and that Fenton Fadeley was entitled to a refund (R. 132). The Court of Appeals held that Fenton Fadeley was the party entitled to appeal to the Tax Court under D. C. Code, Section 47-2403 (1951) and affirmed the decision as to contemplation of death (Petition Appendix A, p. 4).

REASONS FOR DENYING THE WRIT

The decisions of the Court of Appeals do not conflict with any decision of this Court, the Court of Appeals, or any other federal court, and they are correct. The petitioner's assertion that it has been deprived of property without due process is erroneous. These cases do not involve an important question of federal or local law, but merely concern the application of the District of Columbia Inheritance Tax statute to certain covenants in a partnership agreement and the question as to what parties are entitled to appeal from an erroneous assessment.

1. The decisions of the Court of Appeals affirming the District of Columbia Tax Court do not conflict with any decision of this Court, the Court of Appeals, or any other federal court. On the contrary, the decisions as to the consideration issue are in accord with *Broderick v. Gore*, 224 F. 2d 892 (C.A. 10 1955); *Wilson v. Bowers*, 57 F. 2d 682 (C.A. 2 1932); *Edith M. Benzel*, 36 B.T.A. 246 (1937); and *Estate of Lionel Weil*, 22 T.C. 1267 (1954). This agreement among the views of the Tax Court of the United States,

the Courts of Appeals for the Second and Tenth Circuits, lends support to the view that the Court of Appeals for the District of Columbia correctly decided these cases.

2. The petitioner's assertion that it was deprived of property without due process of law is erroneous. An examination of the proceedings before the Tax Court indicates why the Court of Appeals deemed it unnecessary to discuss the cases in a constitutional context. A summary of the Tax Court proceedings, with citations to the Record, is set forth in the statement at pp. 4 and 5 herein, and it indicates that the petitioner was given a fair hearing with opportunity to present any evidence or argument that it desired.

The original petitions alleged that the Assessor's determination was incorrect in treating as testamentary any transfer of good will. The respondents' opening statement expressly explained that respondents were not contesting the Assessor's computation as to good will but were seeking a refund of tax on the ground, among others, that, if a transfer of decedent's interest in the partnership good will occurred, it was for a valuable consideration by or with mutual promises in the partnership agreement. The issue was further argued in the taxpayers' brief. The petitioner chose to ignore this issue throughout the trial. Petitioner never suggested to the Tax Court that it had any evidence on this issue, nor did it ever request the Tax Court to grant it a further hearing nor, after the decision, did it request a rehearing. The decision on this issue involved a question of law based on the terms of the partnership agreement. See *Broderick v. Gore, supra* at p. 897.

Thus, it seems clear that petitioner was afforded full opportunity to present anything it had to say on this issue.

3. These cases do not involve an important question of federal or local law, but merely concern the application of the District of Columbia Inheritance Tax statute to certain covenants in a partnership agreement and the question as to the proper party to maintain the suit for refund.

In support of its argument that these are important cases, the petitioner cites (Petition p. 13) *District of Columbia v. Pace*, 320 U.S. 698 (1944). That case was important; it involved the scope of review of the Tax Court's findings of fact and specifically whether finality of the Tax Court's findings is to be determined by the rules governing review of the findings of an equity court or the findings of a jury. An issue of comparable importance in the administration of the local tax statutes is not present in this case.

The District of Columbia Tax Court, which is charged with the responsibility of deciding cases arising under the local tax statutes, fully considered and correctly disposed of the issues involved in these cases. The Court of Appeals for the District of Columbia affirmed the Tax Court decisions.

4. The Court of Appeals properly disposed of the petitioner's argument regarding the form of the Tax Court's findings of fact, conclusions of law, and opinion. The law is well settled in the District of Columbia that "it is enough that the findings taken together give us 'a clear understanding of the basis of the decision.'" *Minnesota Mining & Manufacturing Co. v. Coe*, 125 F. 2d 198, 199 (C.A. D.C. 1941); and see *Shellman v. Shellman*, 95 F. 2d 108 (C.A. D.C. 1938).

The District contends (Petition pp. 19, 20) that it was deprived of due process because the Tax Court did not "make the requisite findings of fact and conclusions of law on such issue" as required by the District of Columbia Code Section 47-2403 (Petition pp. 3, 5, 6). The District suffered no deprivation, since the Tax Court's opinion clearly set out the facts and law points involved in the decision, and since the form of the Tax Court's findings of fact and opinion was in accordance with Tax Court Rule 34 (Petition p. 8), which was adopted pursuant to the District of Columbia Code, Section 47-2408 (Petition p. 6). Also see *Goodacre v. Panagopolous*, 110 F. 2d 716 (C.A. D.C. 1940), and *Green*

Valley Creamery, Inc., v. United States, 108 F. 2d 342 (C.A. 1 1939).

In conclusion, the taxpayers submit that the District's argument regarding the form of the Tax Court's findings and conclusions is of slight significance and was correctly dealt with by the Court of Appeals.

5. The Court of Appeals correctly held that the Tax Court had jurisdiction of the three cases involving the contemplation of death issue (Petition Appendix A, p. 4). The Court of Appeal's holdings were in accord with its earlier decision, *National Bank of Washington v. District of Columbia,* 226 F. 2d 759 (C.A. D.C. 1953). The decision of the Court of Appeals, adverse to the petitioner, arrives at a result which Congress must have intended; otherwise no one could have brought this suit.

CONCLUSION

For the reasons stated, the respondents respectfully submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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